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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

CESAR MARTINEZ,

Defendant and Appellant.

B203830

(Los Angeles County Super. Ct. No. BA283344)

APPEAL from a judgment of the Superior Court of Los Angeles County. Ruth Ann Kwan, Judge. Affirmed as modified.

Nancy L. Tetreault, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Susan Sullivan Pithey and Theresa A. Patterson, Deputy Attorneys General, for Plaintiff and Respondent.

Cesar Martinez (defendant) appeals from the judgment entered following a jury trial resulting in his conviction of first degree murder with findings of the use and the discharge of a firearm in the commission of the offense. (Pen. Code, §§ 187, subd. (a); 12022.53, subds. (b), (c) & (d).)¹ The trial court sentenced him to serve a term of life, enhanced by a term of 25 years to life for the discharge of the firearm.

Defendant contends there was prosecutorial misconduct and sentencing error.

The People contend that the trial court failed to impose the parole restitution fine required by section 1202.45.

Though the claim of prosecutorial misconduct lacks merit, we will modify the judgment to correct two sentencing errors and affirm the judgment, as modified.

FACTS

Shortly before 4:39 p.m., on March 27, 2005, Jose Meza (Meza), a member of East Los Angeles gang, Michigan Criminal Force (MCF), was lying on a bench in a picnic area during an Easter Sunday picnic in Elysian Park with his family. Suddenly, defendant, a rival gang member from the East L.A. Trece gang (Trece), got out of a white sedan, walked through some bushes, and grabbed and shot Meza twice through the top of the head with a handgun. Defendant ran back to the white sedan, which drove away. Meza was fatally wounded.

Immediately after the shooting, Meza's then 13-year-old sister, R.M., told police detectives that she knew defendant and had seen him twice during the prior year. She said that she knew him by the name of "Speedy," which was defendant's gang moniker. R.M. identified defendant in an April 26, 2005, six-pack photographic display as the assailant. Meza's father also identified defendant as the shooter. R.M. and Meza's father also identified defendant as the shooter.

All further statutory references are to the Penal Code unless otherwise indicated.

² R.M. was unable to identify defendant at an initial photographic display that contained a photograph of defendant at age 12 or 13 and at the preliminary hearing.

R.M. and a woman who attended the picnic testified that defendant's white, four-door Honda Accord was similar in appearance to the gunman's white sedan.

R.M. also testified that earlier that year, she had seen her brother (Meza) and defendant engaged in a gang confrontation. She also observed her sister, E.M. and defendant "mad-dog" one another and exchange gang signs.

Following the shooting, defendant moved to Oregon and lived with a cousin, Ramon Martinez. Martinez told a work supervisor that defendant had "problems" in Los Angeles.

A gang expert testified that the MCF and Trece gangs were bitter rivals and gave his opinion that the shooting was gang-motivated.

In defense, three of defendant's cousins provided him with an alibi. They testified that he was with them at a picnic in a Fountain Valley park (about 37 miles from Elysian Park) on March 27, 2005, from approximately 10:30 a.m. to 6:00 or 6:30 p.m. They produced a 16-minute videotape that they claimed depicted defendant with his family at the picnic.

Defendant called an identification expert to testify generally to issues that may arise affecting the reliability of eyewitness identifications. A defense gang expert testified that in his opinion, there was little evidence of a gang shooting. He opined that based on the information available to the police, it was unlikely that defendant had remained active with the Trece gang after the year 2000.

DISCUSSION

I. Prosecutorial Misconduct

Defendant contends that the prosecutor committed misconduct in that (1) the prosecutor argued that "there was evidence the jury did not see that proved the truth of Ramon Martinez's statements;" (2) the prosecutor "vouched for [the father's] eyewitness identification"; and (3) the prosecutor attempted to incite "the passions of the jurors by asking them to imagine how terrible it would be to see [defendant] 'walk out' of the courtroom a free man." Defendant concedes that the trial court properly admonished the jury after each of these incidents to disregard any misconduct. However, he claims that

the bell could not be "unr[u]ng," and the trial court should have granted a mistrial sua sponte.

The contention is meritless.

A. Background

During final argument, the prosecutor discussed the evidence and commented on witness credibility. During defendant's trial counsel's response, she pointed out what she believed were the flaws in the prosecution's case. She urged the jury to find a "faulty identification" and noted that she had "never seen a prosecutor try so hard to convict somebody who's innocent." Defense counsel attacked the fashion in which the case was investigated. She asked rhetorically: "What was the purpose of flying [Ramon Martinez and his supervisor] down here from Oregon? Just to suggest that [defendant] had trouble in L.A. Yes, he didn't get along with his stepfather. He flew those two men down here for a day just for that. That's [the prosecution's] response to all of this."

In rebuttal, the prosecutor told the jury that it was "unfortunate" when a defense attorney failed to "stick to the evidence" and "engage[d] in personal attacks against other lawyers." He urged the following: "And if you for one second think that you heard any evidence that suggest to you that I'm a criminal, you've got nothing better to do than spend my time trying to convict the wrong gangster of killing another gangster, then I might as well sit down now; and this was all for not (*sic*) if you're inclined to believe that. As [defendant's counsel indicated,] my job is not to get a conviction in any case. My job is to seek justice. I understand that well and truly. And I do work for the People of the State of California, not for the [victim's] family."

The prosecutor argued that when one gang member strikes another down, it is a crime against everyone who resides in the state. The killing has an impact on the individual and also prevents the community from feeling safe in public parks. He assured the jury that if the shoe were on the other foot, he would be "right here presenting the evidence against [Meza] . . . for killing [defendant]. What personal interest or stake do I have in the outcome of this case that I would be a criminal in an effort to try to convict somebody?"

He said: "And if that were the case, [Meza] . . . would have had an attorney representing him who'd probably be up in front of a jury saying the same nonsense that she just said. Whenever a defense attorney gets up in his or her argument and talks more about the prosecutor and the police than the evidence, then you should know right away that she has a problem. And the problem is the evidence. She says several things during her argument. . . . I'll just comment on a few. . . the two guys who came down from Oregon . . . had information about statements the defendant made. Now, once they got here, their testimony turned out to be what it was; and I can't force them to say anything different. I know what they reported. I knew that they were valuable; but once they got here, they said what they said. And I'm stuck with that. And I don't do anything to try to threaten them or manipulate them or entice them into changing whatever they felt comfortable saying. Ramon Martinez knows the family. Ramon Martinez made a statement to Oregon police. You don't know what that statement is. I do. That was my motivation for calling a witness down to testify. The evidence is what it said." (Italics added.)

The trial court sustained defendant's objection and admonished the jury not to speculate on "what has not been introduced in evidence."

The prosecutor then explained that he was merely attempting to rebut defendant's counsel's remarks concerning his motives for calling a witness. The trial court admonished the prosecutor that he was alluding to things not in evidence and asked him to be careful in framing his remarks. The trial court delivered an additional admonition to the jury that it was not to speculate as to the occurrence of events not adduced in evidence.

The prosecutor commented that defense counsel had said that defendants can be convicted on faulty identification testimony. He agreed that such a thing could occur and argued: "[T]he father of that victim, seems like an upstanding guy to me. He was in a position to see what happened. I believe he did see what happened. I believe that if he wasn't sure, he would say so." He also told the jury that they had more evidence than the

father's identification and there was "circumstantial evidence that would not exist if [defendant] were not the killer."

The trial court interrupted the prosecutor's remarks and admonished the jury: "Ladies and Gentlemen, counsel's personal belief is not important." Counsel were instructed not to argue personal belief and the court again asked the prosecutor to be careful in phrasing his argument.

The prosecutor continued on and said: "I'm not meaning to suggest that I am personally vouching. Lawyers are not allowed to personally vouch for any evidence. Okay? We're not allowed to. At least, prosecutors are not allowed to do that. But in arguing, sometimes you say I when you shouldn't. So that's clear."

Finally, the prosecutor urged: "Think about the I.D.'s that were made, the integrity of the I.D.'s, and the circumstantial evidence that supports it. I can't imagine that when [the father] made his I.D.'s that all of those other events that he could not have known about would be true but for the fact--"

Trial counsel objected on grounds of vouching.

The prosecutor continued with his argument, and no ruling was made on the above objection. The prosecutor said: "A reasonable person would not conclude that all of those other things would line up and fall into place behind that I.D. but for the fact that unbeknownst to the witness, all of those things are true. You know, and it is sad. Nobody wants to believe that another person is capable of the kind of crime that happened here. Nobody wants to believe that. But you know it happened. Nobody else in the world killed Jose Meza. Nobody. But the defendant. And I'll reiterate to you the bravado, the brashness of the person who committed that murder is permanently affixed and printed upon the victim's head; and the same bravado has been displayed in this very courtroom If you throw up a gang sign at a witness in a court of law as soon as the jury walks out of the room, what does that say about your mentality? It is the same mentality that was operating on Easter Sunday, 2005. The same mentality. An attempt to really make a mockery out of this entire system of justice. And can you imagine when

this case is concluded that he could walk out of here having been I.D.'d by two people as having committed a murder, having his car described--"3

Trial counsel objected, "Improper argument," and the prosecutor asked why it was improper and requested a "sidebar." The trial court sustained the objection and refused a sidebar conference.

The prosecutor concluded by urging that given the evidence, it would be unjust and a "mockery" for there to be an acquittal.

After the completion of the prosecutor's remarks, the trial court admonished the jury, as follows: "Ladies and Gentlemen, let me remind you that you are the sole judges of the facts in this case and that the burden is entirely on the People. And do not allow the prosecutor's argument relating to what's just and what's unjust as far as your role is concerned. You are here to judge the facts and the evidence and determine the facts and apply the facts to the law. All right."

The jury was admonished and excused to commence deliberations.

The trial court explained to the prosecutor that it did not "appreciate" the argument that it was "unjust for" defendant to walk out of the courtroom, and "so forth." The trial court characterized the argument as a plea to the jury's passion and prejudice and an attempt to direct the jury as to how to conduct themselves during deliberations. The trial court said that it understood that the prosecutor was upset by defense counsel's comments attacking him personally and remarked that defendant's attorney "overdid it." However, the trial court said that it was important for a prosecutor not to vouch for witnesses or to insinuate the content of the statements made outside the trial record. It told the prosecutor that his latter argument had in effect asked the jury to speculate on the existence of such events.

During trial, defendant had surreptitiously made a gang sign at the detective under counsel table. The trial court permitted the detective to testify before the jury about the defendant's conduct.

The prosecutor claimed the trial court's rulings were unfair. He told the trial court that defense counsel had essentially urged that he was unethical and that he would do anything to get a conviction. The prosecutor said that he was entitled to rebut that he had bad motives for calling the Oregon witnesses and that he was entitled to do so by providing a genuine explanation of his motive. The prosecutor claimed that his comments did not refer to evidence outside the record.

The trial court disputed that claim.

The prosecutor continued to protest. The trial court told the prosecutor that it was the trial court's duty to see that the jury understood its duties and responsibilities in deciding the case. The prosecutor's comments were either improper or would have been easily misunderstood by the jury. Consequently, it was the trial court's duty to give appropriate admonitions to cure any error.

Thereafter, defendant made a motion for a mistrial on the grounds of prosecutorial misconduct, which the trial court denied. The trial court commented that the prosecutor's remarks in rebuttal may not have been proper, but the prosecutor only intended to rebut an attack on his integrity. The comments did not rise to the level of misconduct. Furthermore, the trial court had admonished the jury as to their duties vis-à-vis the improper comments, and the jury would have understood the trial court's admonitions.

B. The Relevant Legal Principles

A prosecutor's misconduct violates the Fourteenth Amendment to the United States Constitution when it infects the trial with such unfairness as to make the conviction a denial of due process. (*Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 642-643.) Misconduct by a prosecutor that does not render a trial fundamentally unfair is error under state law if the prosecutor uses "deceptive or reprehensible methods" to attempt to persuade the court or the jury. (*People v. Morales* (2001) 25 Cal.4th 34, 44.) ""A defendant's conviction will not be reversed for prosecutorial misconduct' that violates state law, however, 'unless it is reasonably probable that a result more favorable to the defendant would have been reached without the misconduct.' [Citation.]" (*People v. Wallace* (2008) 44 Cal.4th 1032, 1071.)

""[W]hen the claim focuses upon comments made by the prosecutor before the jury, the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion." [Citation.]" (*People v. Ayala* (2000) 23 Cal.4th 225, 284.)

""A prosecutor is held to a standard higher than that imposed on other attorneys because of the unique function he or she performs in representing the interests, and in exercising the sovereign power, of the state. . . . Prosecutors who engage in rude or intemperate behavior, *even in response to provocation by opposing counsel*, greatly demean the office they hold and the People in whose name they serve." [Citation.]" (*People v. Alvarado* (2006) 141 Cal.App.4th 1577, 1584.)

C. The Analysis

As defendant observes, bad faith plays no role in most analyses of prosecutorial misconduct. (See *People v. Hoyos* (2007) 41 Cal.4th 872, 924 & fn. 36.) And, the trial court's comments do not indicate that the trial court improperly based its rulings on a lack of bad faith by the prosecutor. (*Ibid.*) We agree with the People's analysis of the issue on appeal. To the extent the prosecutor crossed the line in arguing the case, the trial court sustained its own and defendant's objections before the jury and then appropriately admonished the jury to disregard any improper implications in the prosecutor's remarks. The jury is presumed to have understood and followed a trial court's instructions. (*People v. Smithey* (1999) 20 Cal.4th 936, 960.) This court concludes that the trial court's admonitions were sufficient to negate any harmful effects that might have otherwise flowed from the prosecutor's remarks.

Also, the trial court did not err when it denied the motion for a new trial. The trial was not so infected with unfairness as to deny defendant a fair trial. The record supports the trial court's conclusion that the prosecutor's remarks were made for the purpose of rebutting an attack leveled against him personally by defendant's counsel. He made the remarks for no deceptive or reprehensible purpose. Because the trial court delivered admonitions to the jury curing any potential harm flowing from the remarks, the remarks would not have diminished the jury's sense of responsibility, nor displaced the trial

court's admonitions. (*People v. Smithey, supra*, 20 Cal.4th at p. 961; *People v. Wash* (1993) 6 Cal.4th 215, 261.)

II. The Sentencing Error

Defendant contends that the sentence is unauthorized as the trial court imposed a term of life without the possibility of parole for the murder, in lieu of the proper term of 25 years to life.

The People point out that during the oral proceedings of sentencing, the trial court imposed a term of "life," which was enhanced by an additional term of 25 years to life for the discharge of a firearm. In the abstract of judgment, yet another error was made: a notation that for the murder, defendant had been committed to state prison for a term of life without the possibility of parole.

The punishment for first degree murder in the absence of special circumstances is not a straight "life" term, but a term of 25 years to life. (§§ 190, et seq.)

Accordingly, we will order the judgment modified to impose the authorized term of 25 years to life. (*People v. Cunningham* (2001) 25 Cal.4th 926, 1044-1045 [an unauthorized sentence is subject to judicial correction whenever it comes to the attention of a reviewing court].) Also, we will order the superior court to correct the clerical error in the abstract of judgment. (*People v. Mitchell* (2001) 26 Cal.4th 181, 185 [courts may correct clerical errors at any time]; *People v. Mesa* (1975) 14 Cal.3d 466, 471 [the rendition of judgment is the oral pronouncement].)

III. The Restitution Fine

The People contend that the failure to impose a parole revocation restitution fine in this instance constitutes error, and we agree.

At sentencing, defendant was ordered to pay \$4,000 in direct restitution to Meza's family for burial costs. The trial court also ordered a \$200 restitution fine pursuant to section 1202.4, subdivision (b). However, it failed to impose and stay the parole revocation restitution fine as required by section 1202.45. (*People v. Brasure* (2008) 42 Cal.4th 1037, 1075; *People v. Smith* (2001) 24 Cal.4th 849, 851-852.)

We will modify the judgment to impose the mirror-image \$200 parole revocation restitution fine and order it stayed pending revocation of parole.

DISPOSITION

The judgment is modified by striking the term imposed at sentencing for the murder. In lieu thereof, the judgment shall provide for a term of 25 years to life for the conviction of first degree murder in count 1. The judgment shall also provide for a \$200 parole revocation restitution fine to be imposed pursuant to section 1202.45, which is ordered stayed until such time as defendant is released on parole and his parole is revoked. As modified, the judgment is affirmed.

After the issuance of the remittitur, the superior court shall cause its clerk to prepare and send a new abstract of judgment to the California Department of Corrections and Rehabilitation reflecting the modifications in the judgment.

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		CHAVEZ	, J.
We concur:			
	, P. J.		
BOREN			
	, J.		
DOI TODD			